

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

JOANNE HARRIS, *et al.*,

Plaintiffs,

V.

ROBERT F. McDONNELL, JANET M.
RAINEY, and THOMAS E. ROBERTS,
in their official capacities

Defendants.

Civil Action No. 5:13-cv-00077

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS GOVERNOR McDONNELL
ON SOVEREIGN IMMUNITY GROUNDS**

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Despite the limitations in its text, the Eleventh Amendment also bars suits brought by citizens of the State being sued. *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934); *Hans v. Louisiana*, 134 U.S. 1 (1890). Because the bar is an "immunity from suit," and not merely a "defense to liability," claims of Eleventh Amendment immunity should be adjudicated straight away to preserve the jurisdictional nature of the States' immunity. *See Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 482 (4th Cir. 2005). And this bar to suit extends to any officer of a State, *Minnesota v. Hitchcock*, 185 U.S. 373 (1902), unless the *Ex Parte Young*, 209 U.S. 123 (1908), exception applies. That exception permits a Federal court to issue prospective, injunctive relief against a state officer to prevent ongoing violations of Federal law, on the rationale that such a suit is not a suit against a State for purposes of the Eleventh Amendment. *McBurney v. Cuccinelli*, 616 F.3d 393, 399 (2010).

A central limitation on the exception, however, is that the state officer being sued must have a "special relation" with the "challenged statute." *Id.* (quoting *Ex Parte Young*, 209 U.S. at 157). This "requirement protects a state's Eleventh Amendment immunity while, at the same time, ensuring that, in the event a plaintiff sues a state official . . . to enjoin unconstitutional action, '[any] federal injunction will be effective with respect to the underlying claim.'" *Id.* (quoting *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 333 (4th Cir. 2008)). And it is well established that "[t]his requirement of '*proximity to and responsibility for* the challenged state action' is not met when an official merely possesses '[g]eneral authority to enforce the laws of the state.'" *Id.* (emphases in original) (quoting *Limehouse*, 549 F.3d at 331, 333); *see also Waste Mgmt. Hldgs. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001) (requiring that the plaintiff show that the Governor has a "specific duty to enforce" the challenged law for the *Ex parte Young* exception to apply).

The Plaintiffs have not alleged facts suggesting that Governor McDonnell has any special relation/proximity to or responsibility for, much less any "specific duty to enforce," Article 15-A of the Virginia Constitution, Virginia Code §§ 20-45.2 or -45.3, or any other Virginia law that does not permit persons of the same sex to enter the marital estate or that does not recognize the marital status conferred on persons of the same sex by another state. Plaintiffs' complaint is bereft of any such allegations, but instead abounds with claims that Governor McDonnell "possesses '[g]eneral authority to enforce the laws of the state.'" *McBurney*, 616 F.3d at 399; (Doc. 1 at 12, ¶34.) That being so, he should be dismissed on the grounds of sovereign immunity. *See id.* at 402.

Respectfully Submitted,

ROBERT F. MCDONNELL,
in his official capacity

By: _____ /s/
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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of August 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and that I also sent a filed copy of the same to the following by U.S. Mail, postage prepaid:

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